



**Republic v Tuwei (Criminal Case 67 of 2016)
[2023] KEHC 1311 (KLR) (1 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1311 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 67 OF 2016
HK CHEMITEI, J
MARCH 1, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

MICHAEL KIPKURUI TUWEI ACCUSED

JUDGMENT

1. The accused person herein was charged with the offence of Murder contrary to section 203 as read with section 204 of the *Penal Code*. It was alleged that on March 14, 2016 at Ndoswa Location, in Molo Sub-County within Nakuru County murdered Benson Kiplang'at.
2. When the matter came for plea the accused denied the offence and the prosecution called several witnesses to established their case and their evidence can be summarised as hereunder.
3. PW1 was Hilary Kibet Keitany. He testified that on March 13, 2016 at about 1.30p.m. he was in house at Ndoswa in Molo with deceased and after they took lunch they decided to walk to the center. That they met four men armed with arrows and the deceased told him that those were his friends. The said men told them to stop and they obeyed and were ordered to sit down.
4. He testified further that he wanted to run away but deceased told him “hawa ni marafiki” that is they were friends. That since he was a stranger in the area they tied his hands with a rope and took them to a river and told them to sit down. Further, that he then saw the deceased having been shot in the arm with an arrow but he could not tell who shot him since the men were behind him.
5. PW1 went on to testify that he became scared, pushed off the man who held him and took off and so did the deceased. That he could identify the man who tied his hands and that the accused was not the man who tied him up. Further, that he was not sure that accused was one of the men who confronted them as he only saw the man who tied him. Also, that he had an arrow lodged on his side as he ran



- away and he went to hospital for treatment. PW1 testified that he learnt on next day from PW2 that deceased had died and he had given him the names of the person who shot him.
6. On cross- examination, PW1 stated that he could not identify who shot him and that a pastor found him and did first aid. That the said pastor then took him to the police camp and then to hospital but he however did not know the name of that pastor. PW1 stated further that PW2 accompanied him to the hospital then he went to Elburgon Police Station where he recorded his statement. He however could not recall the date when he recorded his statement.
 7. PW1 confirmed that the identification parade form named him as one of the persons who identified the accused but the same was not true as he did not identify the accused at any parade. He stated that he never saw deceased after the incident.
 8. Upon re-examination, PW1 testified that he only saw the accused later at the police station and that he participated in the parade at Elburgon Police Station but he did not identify any suspect at that parade.
 9. PW2 was Henry Kipyegon Rotich. He testified that he knew the deceased who was his uncle and that he also knew the accused but not before the incident. That on March 23, 2016 at 1.00p.m. while coming from Nakuru on his way to Njoro, he met PW1 who was bleeding from the side and was on a motor bike on his way to hospital. Further, that he accompanied PW1 to Njoro Hospital and they were referred to Nakuru PGH.
 10. PW2 testified further that PW1 had been shot with an arrow but he did not see it and that he was treated and after 20 minutes the deceased was also brought to the hospital in a police vehicle. That he had an arrow lodged in his body and he asked the deceased who had shot him. The deceased was in pain but could speak and he told him that it was Sylvester, Kevo, Kipkemoi and Mwalimu ya Ndoswa Primary.
 11. He further testified that he knew all these people as they were neighbours and that the accused in the dock was 'Sylvester' but his real name was Michael Kipkurui, although in the village he was known as "Sylvester". That the deceased did not tell him why the four men had attacked him and that shortly thereafter the deceased died as he was bleeding heavily.
 12. PW2 went on to testify that the arrow which had been marked as MFI 1 was removed from the side of the deceased during the autopsy and he witnessed the autopsy. Further, that he later attended an identification parade at Elburgon at police station and he identified Sylvester who was the accused.
 13. On cross examination, PW2 stated that on March 13, 2016, he was headed to his village in Ndoswa but he did not get home as he met PW1 being taken to hospital. That the accused was a neighbor in Ndoswa so he knew him very well. He stated further that the deceased was brought to hospital in a police vehicle and that he could not recall the date when he recorded his statement. He added that he recorded it 2-3 days later. He was not at the scene of the incident and he also did not see who shot both the deceased and PW1. He confirmed also, that the deceased told him 4 men attacked them.
 14. PW3 was Samuel Kiplagat. He testified that the deceased was his brother and on March 22, 2016, he went to the mortuary and identified his body to the doctor. That the deceased body had a wound on the neck, shoulder and on the right side, and he saw the doctor remove an arrow head from his body. He identified the said arrow head and the same was marked as MFI 1.
 15. On cross examination, he stated that he did not witness the incident and that he did not see who shot deceased. That he could not identify them and he also did not know the accused.



16. PW4 was Joseph Kibet. He testified that he knew the deceased as he was his relative and that on March 22, 2016, he came to the mortuary in Nakuru and identified his body to the doctor before the autopsy. That the doctor removed an arrow head from the body.
17. PW5 was No.88261 P.C. (W) Rebecca Namai from Elburgon Police Station. She testified that on March 22, 2016 at about 9.30 a.m. the OCS directed her to go to PGH Nakuru to witness an autopsy on the body of the deceased. That she saw the deceased with multiple injuries on the left side of his body and an arrow head was retrieved from that side.
18. She collected the arrow head and the post mortem form which she returned to the police station. She handed over the arrow head and the postmortem report to the investigating officer, Chief Inspector Andrew Kwandigo. She produced the arrow head as an exhibit Pexh.3.
19. On cross examination, she stated that a single arrow head would not cause multiple injuries and that the witnesses said that several arrows were fired at the deceased. Also, that she could not recall how many perforations she saw on the deceased body.
20. PW6 was No.83296 P.C. Josiah Maberu attached to Elburgon Police Station and the arresting officer in the case. He testified that on October 15, 2016 at 3.00a.m. he received a call from the OCS directing him to go to Lawena area. That they went in a land cruiser to Kiambi Police Post where they picked an administrative police officer who led them to the house of the deceased. That they cornered the house and he called accused by his name, they identified themselves as police officers and the accused opened the door and they told him the reasons for his arrest.
21. PW6 testified that they took the accused to the police station and he was the one in court but he could not identify him as he cannot remember his face. He added that he did not recover anything from accused.
22. On cross examination, he stated that in his statement he said they called accused by his name "Sylvester" and he responded as that was his alias by which he was known in the area. That he did not know accused prior to his arrest and it was an informer who told them the accused's name. Further, that he did not ask accused to show him his identity card and he also did not know the accused's name.
23. Upon re-examination, PW6 testified that the accused did not deny that his name was "Sylvester" and he recovered nothing inside the house.
24. PW7 was Dr. Titus Ngulungu a Government Pathologist based at PGH Nakuru who testified that he had a postmortem report of deceased done by Dr. Wachira dated March 22, 2016. That the body was of a male African adult which was naked, nutrition was good and the same was well preserved. Further, that the body had a brain injury, was decomposing and there was arrow head protruding from the left lumber region; open wound for 2 days measuring 3 x 3 cm. Also, that right lung showed 100mm contusion of the lung, there were injuries on the colon measuring 2 x 2 c.m.
25. PW7 testified further that there was blood on the back, bruising of the liver which resulted blood trauma. That there was an arrow head retrieved from lumber region and the cause of death was massive internal bleeding as a result of sharp trauma through the abdomen with an arrow. Dr. Wachira signed the same and it was produced as Exhibit 2.
26. On cross examination, PW7 he confirmed that the exact cause of death was massive internal bleeding due to sharp trauma as a result of sharp object arrow.
27. PW8 was No.83492 P.C. Josiah Maberu. He testified that on November 15, 2016 he was at the station when the commander told him to accompany an officer and proceed to arrest a suspect at 3 a.m. They



- went to the accused's house who was known by the names Sylvester. That upon calling the accused by his alias name Sylvester he opened the door and they introduced themselves, arrested him and took him to the station. He identified the accused as the one before the court.
28. On cross examination, PW8 confirmed that they had gone to arrest one Sylvester and that there was tension between Ogiek and Tugen Community since March and that was why it had taken long. He stated that P.C. Losikiva took them to the accused's place as he was familiar with him. That he had however been transferred and he did not know to which place. Further, that he was aware the said officer did not record statement and he also did not witness the incident.
 29. PW9 was No.23065 CIP Andrew Kivindyo, the investigating officer in this matter. He testified that on March 30, 2016 he was at Kibingei Settlement Scheme where he had gone to provide security for there were clashes between Ogiek and Tugen tribes. That at 1300 hours he received a report that someone had been shot by an arrow at Ndoswa. He proceeded and searched for the casualty along the river bank and he found the deceased lying on the ground in a pool of blood.
 30. PW9 testified further that the deceased had an arrow head embedded on his right buttocks and it had penetrated through the wallet. That there was another wound on the abdomen. He then ferried him in the police car and took him to a temporary camp. That the deceased told him that he had been attacked by his neighbor from the Ogiek Community, alias Sylvester whom they had arrested, also one Kevo son of Bernard and others. Further, that at Nakuru PGH, the deceased was taken to theatre and the arrow was removed from the abdomen but he passed away on the same day.
 31. PW9 went on to testify that he commenced his investigation whereby a postmortem was done and on November 15, 2016, he arrested the accused whose name was Michael Tuwei alias Sylvester but the other suspects were still at large. He added that the deceased had been attacked because of retaliation after one of their own had been killed using a pistol. That he did identification parade and accused was positively identified by witnesses who had already testified.
 32. On cross examination, PW9 stated that the deceased was shot on March 13, 2016 not on March 14, 2016. That Rebecca Namai was one of their officers who filled the postmortem report as she had witnessed the same.
 33. PW9 stated further that he got the attackers' names from the deceased after interrogating him and the name Sylvester did not appear in the accused documentations. He also stated that it took almost 8 months to arrest the accused because he had gone into hiding and Son of Bernard who called Kevo was still at large. He added that the accused was known to the deceased because they were neighbours.
 34. Upon re-examination, PW9 testified that he indicated in the O.B. the attackers' names as given to him by the deceased and his cousins. That the accused produced his identity card reading Michael Tuwei but when he did an identification parade the witnesses positively identified him as Sylvester.
 35. When placed on his defence the accused testified that his names were Michael Kipkurui Tuwei and he was a farmer and he lived in Ndoswa. It was his testimony that he did not kill the deceased and that on March 10, 2016, he went to Olenguruone to check his cows and came back on March 20, 2016 when he heard about the incident. Further, that he was arrested on October 15, 2016 when he came back and stayed at home.
 36. Further that he did not know PW1 at all and he was in Olenguruone when he said that he saw him and that PW2 lied as he was not called Sylvester as per his identity card. That he did not go by the nickname Sylvester and he also didn't know who Kevo, Kipkemoi or Mwalimu ya Ndoswa were. When he was referred to the postmortem report, DW1 testified that he was not involved in the death of the deceased on March 13, 2016.



37. On cross examination, he stated that he was 45 years old and had been at Ndoswa since 1997 so he knew the area very well and he even had friends. That he however did not know the deceased, had never seen him and he also did not know PW2 or all the witnesses.
38. That between March and November, he was at home in Ndoswa until he was arrested and that his name was not Sylvester. In addition, that the prosecution witnesses must have been mistaken and had lied to the court.
39. The court directed the parties to file written submissions which they have complied.

Prosecution Submissions

40. The prosecution submitted that the accused denied ever being in Ndoswa when the incident happened but he failed to place any evidence that he was at Olenguruone at his father's residence. That the accused failed to call the family members who informed him that the deceased had died during clashes. Further that a witness gave evidence from what the deceased said and there was a survivor who saw the accused in the company of the other assailants.
41. The prosecution submitted further that upon an officer being tipped as to where the accused was spotted, the said officer proceeded to accused house, called him by his alias name and he responded. It was the prosecution's submission that there was no doubt as to the identity of the accused and that its witness had confirmed that it was Sylvester and no other person was known by that name in the village. Further, that PW1 had never met the accused before so there was no enmity between them and that PW1 had attended an identification parade where he identified the accused. Also, that the credibility of the identification parade had never been challenged and was above board.
42. The prosecution went on to submit that the accused evidence that he came into the picture after the incident did not hold water and that his undoing was to revisit the village where he had committed the offence. That if he had not resurfaced the murder mystery would not have been solved. Further, that the defence counsel had not disclosed what injustice the accused would face in the event the information does not indicate the correct date when the incident happened.
43. The prosecution concluded by submitting that its evidence was cogent as it was beyond reasonable doubt and the matter before the court was not a frame up as the defence would want the court to believe. That the accused had not shown any remorse and therefore it urged the court to find him guilty as charged on March 13, 2016.

Defence submissions

44. The accused in his submissions identified four issues for determination by this court namely; whether the police correctly identified accused during the arrest, whether there was need for an Identification parade to identify the accused and yet he had been identified as Sylvester by both the witnesses and the police, whether the offence was committed on March 14, 2016 or March 13, 2016 and lastly, whether it was possible to identify a person/accused in midst of clashes.
45. On the first issue, it was submitted on behalf of the accused that there was no corroboration of the evidence by PW6 that indeed the accused respondent when called out the name Sylvester. That the accused name was Michael Tuwei as per his identification documents and in accordance to the statement of information before the court. Further, that the accused counterpart whom he was with did not record nor called to make any statement.



46. In addition, that PC Looksira the officer in the company of the arresting officer PC Josiah Mabera during arrest never appeared to testify nor made any statement in support of the same. Therefore, that the identification of the accused as Sylvester was either mistaken identity or did not happen and that no evidence had been produced to prove that Sylvester was an alias of Michael Tuwei.
47. He draws the court's attention to the cases of *Donald Atemia Sipendi v Republic* [2019] eKLR, Kariuki Njiru & 7 others vs Republic while citing the case of *Francis Kariuki Njiru & others v Republic* [2001] eKLR and Charles O. Maitanyi v Republic.
48. On the second issue, it was submitted on behalf of the accused person that PW1 and PW2 had testified that they knew the accused as they were neighbours, so why did the police have to conduct an identification parade. It was submitted further that police and the witnesses had no evidence placing the accused near the crime scene and it seemed they were in a fishing expedition. The courts attention was draw to the case of *Republic v Valentine Maloba & 2 others* [2021] eKLR on when to conduct an identification parade.
49. On the third issue, it was submitted that the evidence produced before the court by the prosecution was in total variance with what was in the statement of information. That all the witnesses including the post mortem report produced before the court stated that the offence was committed on March 13, 2016 contrary to the statement of information on the accused which provided that the offence was committed on March 14, 2016. The court was urged to disregard the prosecution evidence as the same was contradicting hence could not sustain a conviction. The court's attention was drawn on the case of *Peter Ngure Mwangi v Republic* [2014] eKLR.
50. On the last issue, it was submitted that PW1 who was the chief witness in this case was unable to positively identify the accused and also that his evidence lacked clarity, believability and just from his evidence it was difficult to identify any culprit as it was in the midst of clashes because of tension and many people.
51. In conclusion, it was submitted on behalf of the accused that the prosecution had not proved their case beyond reasonable doubt and therefore the court was urged to find the accused innocent and acquit him of the charges brought him.

Analysis and Determination

52. I have looked at the evidence on record and duly considered the submissions before this court. This court has a duty to weigh and evaluate the evidence as placed before it by the prosecution to establish whether the offense against the accused has been proved beyond reasonable doubt. The burden of proof to tender evidence to disapprove the innocence of an accused person is always cast upon the prosecution.
53. Lord Denning dealt with the onus of proof in criminal cases in the case of *Miller v Minister of Pensions* (1947) 2ALL ER 372 where he stated:

“It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The Law would fail to protect community if it admitted fanciful possibilities to deplete the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence of course it is possible but not in the least probable; the case is proved beyond reasonable doubt but nothing short of that will suffice.”



54. It is also trite law that he accused person is presumed innocent until the contrary is proved as clearly provided for under article 50 (2) (a) of the Constitution of Kenya, 2010. Therefore, the prosecution bears the burden to prove that the offence was committed and the culprit is the accused person in the dock. The evidence by the prosecution must meet the threshold of beyond reasonable doubt and nothing less like fanciful and suspicious possibilities.
55. In the instant suit, it is not in dispute that the accused person has been charged with the offence of murder contrary to section 203 of the Penal Code. The said section provides as follows:
- “ Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”
56. This definition was well captured in the case of Republic v Andrew Omwenga [2009] eKLR where the Court stated:
- “It is clear from this definition that for an accused person convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:
- a) The death of the deceased and the cause of that death.
 - b) That the accused committed the unlawful act which caused the death of the deceased; and
 - c) That the accused had the malice aforethought.”
57. The first ingredient of death of the deceased and the cause of death was proved by the post-mortem report produced in court by PW7 as Exhibit 2 and it was PW7’s testimony that the cause of death was massive internal bleeding as a result of sharp trauma through the abdomen with an arrow.
58. On the second ingredient, where the prosecution is required to prove beyond reasonable doubt that the accused committed the unlawful act which caused the death of the deceased the prosecution in proving the same relied on the testimonies of PW1, PW2, PW6, PW8 and PW9 who testified to the accused identity as the person who committed the unlawful act against the deceased and had been arrested for the same. Further, that the accused went by his alias name Sylvester.
59. The accused on his part denied committing the offence and that at the time of the incidence he was not in Ndoswa area where the incident occurred but rather he had gone to Olenguruone to check on his cows.
60. Upon analyzing the evidence by the prosecution witnesses and in particular PW1, he was unable to identify the accused person as the one in court and testified also that he had participated in an identification parade but he did not identify the accused then. Further, PW6, PW8 and PW9 also identified the accused by his alias name at the time of the arrest and the accused real name was known after production of his identification card. In addition, PW6 testified that the accused was the one in court but he could not identify him as he cannot remember his face.
61. I find that the said testimonies by the prosecution witnesses as to who committed an unlawful act against the deceased was not sufficient as to put the accused at the scene of crime and I hold that the second ingredient on the charge of murder has not been proved by the prosecution beyond reasonable doubt.



62. Having established that, this court cannot move to address the third ingredient as the same is caught up in the drag net of the second ingredient which the prosecution failed to prove beyond reasonable doubt.
63. At any rate there was no evidence that an identification parade if any was conducted nor any documentary evidence produced despite being referred to by the witnesses.
64. Although the accused defence had many caps I find that in the absence of corroboration of what the deceased in essentially a dying declaration told the police, it is not possible to exactly pin point with precision that it was the accused who fatally wounded the deceased. This is mostly important considering the volatility of the area pursuant to the tension between the communities living in that area.
65. The prosecution over the years seemed not to have been interested to trace the other three suspects mentioned by the deceased and ensure that they were charged and or brought to book.
66. Consequently, and for the reasons stated above the accused is granted the benefit of doubt and he is hereby set free under the provisions of sections 215 as read with section 306(2) of the *Criminal Procedure Code*.
67. The sureties if any are hereby discharged.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 1ST DAY OF MARCH 2023.

H. K. CHEMITEL.

JUDGE

